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In the Supreme Court of the United States

OCTOBER TERM, [redacted]1970

JESSE HOSKINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF

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Petitioner will reply to the government's brief in the order in which the government poses and replies to the questions presented.

1.

The statutory presumption contained in 21 USC 174 is unconstitutional. Petitioner has not waived his right to present the matter to the reviewing courts.

Initially, the government contends that petitioner challenged the constitutionality of the statutory inference of 21 U.S.C. 174, "for the first time in the court of appeals" (G. Br. 3). In our argument, under Point 3, *infra,* petitioner claims ineffective representation of appointed

counsel for failure to raise this proper constitutional issue at the trial level. He ought not be foreclosed from raising it now.

It is true that *Yee Hem* v. *United States,* 268 US 178 held constitutional the presumptive feature contained in 21 U.S.C. 174. But that case was decided in 1925, before the recent group of decisions announced by this court, as set out in petitioner's Petition, pp. 8-19.

On this point, the court of appeals ruled ". . . that since defendant did not raise the constitutional issue when presented at the trial level, which was the earliest possible occasion, he is now precluded from doing so." (App. 3). But it is precisely the failure of court-appointed counsel to raise this issue which is the subject of petitioner's complaint under Point 3, *infra,* ineffective assistance of counsel.

However, petitioner may raise the constitutional question on appeal, even if not presented to the trial court: *Grosso* v. *United States,* 390 US 62, *O'Connor* v. *Ohio,* 385 US 92 and *Curtis Publishing Co.* v. *Butts,* 388 US 130.

Because this court has granted certiorari in *Leary* v. *United States,* No. 65, Oct. Term, 1968, the instant petition should be granted to determine the validity of the presumptive feature of 21 U.S.C. 174 relating to narcotic importation.

2.

The trial court erroneously instructed the jury that the government need not prove that the narcotics were imported into the United States.

The government replies to this point at pp. 5-7 of its Brief in Opposition. And again, the government points out initially that "The court charged the jury without ob-

jection. . .". Appointed counsel's failure to object is an additional reason for petitioner's claim of ineffective assistance of counsel.

But the error claimed here is plain error which should have been noticed by the court of appeals and should be noticed by this court. *Screws* v. *United States,* 326 US 91, 107 (1945).

In no uncertain language, the trial court instructed the jury that if the government showed that defendant had possession of the narcotic drug "*then it is not necessary for the government to prove that the drug was imported or brought into the United States contrary to law or that the defendant knew that the drug was imported or brought into the United States contrary to law.*" (Tr. 212-213; emphasis added).

We pointed out to the court of appeals that a similar instruction was deemed reversible error by the Second Circuit Court of Appeals in *United States* v. *Peeples,* 377 F. 2d 205 (1967). But the Court of Appeals for the Seventh Circuit declined to consider the error, stating the defendant was precluded from asserting such error on review because ". . . the challenged instruction was never objected to on trial." (App. 5).

In its reply brief at this level, the government contends that the trial judge instructed additionally, after the claimed defective charge, that the government still had the burden to prove the defendant's guilt beyond a reasonable doubt and that the statute means that if the jury should find that the defendant had possession of the narcotic drug, ". . . the fact of such possession alone, unless explained to the satisfaction of the jury, permits the jury to draw the inference and find that the narcotic drug was

imported contrary to law and to draw the further inference that the defendant had knowledge that the narcotic drug was imported contrary to law." (Tr. 213).

But just previously, the trial court had instructed the jury that ". . . *it is not necessary for the government to prove that the drug was imported or brought into the United States contrary to law or that the defendant knew that the drug was imported or brought into the United States contrary to law.*" (Tr. 212-213, emphasis added).

But that is precisely what the government was required to prove.

At best, the instructions were equivocal on the basic and essential issue of what the government was required to prove. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States,* 326 US 607, 613 (1945).

3.

Petitioner was deprived of effective assistance of counsel.

We need but point out that at every attack made in the court of appeals, the court replied that petitioner failed to make an appropriate motion at the trial level and therefore ought not to be heard.

One of the most serious deprivations the petitioner suffered at trial level was failure of appointed counsel to make a motion to suppress the evidence, based on *Preston* v. *United States,* 376 US 364, 367 (1964). *United States* v. *Nikrasch,* 7 Cir. 367 F.2d 740 (1966) and *United States* v. *Harvey,* 7 Cir. 397 F.2d 526 (1968).

The government here contends (G. Br. p. 8) that because petitioner was observed, just prior to his arrest, placing something under the automobile seat, it would have been pointless to file the motion to suppress.

In a decision rendered on April 11, 1969, by the Seventh Circuit Court of Appeals, *United States* v. *Stevenson*, No. 16894, that court *reversed* a conviction charging possession and sale of narcotics under the authority of *Preston*, *Nikrasch* and *Harvey*, under circumstances such as here. Stevenson was being sought upon an outstanding warrant for his arrest for a narcotics transaction alleged to have occurred in November, 1966. Upon his arrest in August, 1967, the agents searched his car after he was out of the car, and found narcotics under a mat on the floor. In the instant case, petitioner was arrested because of a prior outstanding arrest warrant, was taken out of his car, and *then* the car was searched and narcotics allegedly was found under a mat on the floor of the car (Tr. 8).

In *Stevenson, supra,* a motion to suppress having been made at the trial court and denied, the court of appeals stated, "The search was not reasonable as incidental to a lawful arrest because there was no danger to agents, of the car being used to escape, or of the evidence relating to the arrest warrant being destroyed." (Slip opinion, p. 5).

Similarly, in the case at bar, Hoskins had been taken out of the car by 3 agents with drawn guns, and then the car was searched. But neither the trial judge nor the court of appeals was given an opportunity to pass on the question because the motion to suppress was not made.

But, the court of appeals should have entertained the question. On March 24, 1969, this court decided that even in a post-conviction proceeding under 28 U.S.C. 2255, the claim that a federal prisoner was convicted on evidence obtained in an unconstitutional search and seizure was cognizable, even though not raised either in the trial court or in the court of appeals: *Kaufman* v. *United States,* No. 53, Oct. Term 1968 (4 Cr. L. 3180).

In our Petition, we pointed out that the issue was raised at the court of appeals level, although not at trial. At the very least then, the conviction herein should be reversed and remanded to the trial court for an evidentiary hearing in connection with petitioner's motion to suppress the evidence. In view of the decision by the Seventh Circuit Court of Appeals in *Stevenson, supra,* petitioner was woefully deprived of effective assistance of court-appointed counsel.

The court of appeals applied the waiver theory to three important areas: (1) defendant's appointed counsel did not attack the constitutionality of the law in question at trial level, (2) court-appointed counsel did not make a motion to suppress the evidence, and (3) court-appointed counsel did not object to the improper instructions.

Added is the fact that the counsel who actually tried the case, substituted a day before the trial for his partner, who was the original appointed counsel. We need not engage in "nice calculations as to the amount of prejudice" to the petitioner, as in *Glasser* v. *United States*, 315 US 60, 76. Petitioner has affirmatively demonstrated that he was denied effective assistance of court-appointed counsel.

4.

Reference to other crimes constituted reversible error.

It was no part of the government's case that the jury be informed that the agents went to arrest the petitioner because he had been indicted.[1] The jury was advised at the outset that the petitioner was being arrested for a violation of the federal narcotics law (Tr. 8).

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[1] On the trial in relation to this indictment, petitioner was acquitted by a jury in the District Court in Chicago on December 24, 1968.

The government asserts that evidence of a prior crime is admissible when the evidence of that crime is so blended or connected with the crime on trial that proof of one incidentally involved the other (G. Br. 10). We have no quarrel with that rule of law except it is inapplicable. The charge here was possession of narcotics. The fact that defendant had previously been indicted and charged with conspiracy to violate the narcotics laws [upon which charge he was acquitted by a jury], was not blended or connected with the crime for which he was on trial.

Considering the onus under which a defendant appears before a jury when the charge is narcotics, he is irremediably prejudiced when evidence of another narcotics accusation is brought to the attention of the jury. This court's holding in *Michelson* v. *United States*, 335 U.S. 469, 475-6, suggests reversal of the erroneous holdings by the court of appeals on this point.

5.

The trial court improperly denied petitioner's access to Jencks Act material.

The government does not dispute what occurred at trial: that counsel inquired of a government agent on cross-examination whether or not he knew the custom of his office "... as to records they keep with reference to where any agent is employed or what he is doing at any given time." (Tr. 139). The agent had testified that he was in radio communication with his office throughout the day (Tr. 138-139). Counsel was attempting to establish how many agents were in their car. There was an evidentiary disputation between the petitioner and the narcotics agents as to how many agents were in the agents'

car (Tr. 140). However inartfully, defense counsel was attempting to establish whether certain written records were kept in the office headquarters. If such were established, counsel could proceed (1) either to subpoena such records or (2) demand their production under the Jencks Act, 18 U.S.C. 3500.

We submit counsel was limited in his attempt to lay a foundation for the demand of Jencks Act records or statements.

CONCLUSION

For the foregoing reasons we pray the Petition for Certiorari be granted.

Respectfully submitted,

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April 18, 1969